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CONTRIBUTING NEGLIGENCE—WHEN SHOULD IT BE A DEFENSE IN A STRICT LIABILITY ACTION?

Contributory negligence¹ has long been recognized as one of the most common defenses in negligence actions.² The effect of contributory negligence in negligence cases, however, has been drastically altered by Louisiana's comparative negligence statute.³ Perhaps in response to this development, the Louisiana Supreme Court recently broached the question of when *contributing negligence*⁴ should be a defense in strict liability actions. The question is one of great importance, and the answer ultimately given will have far-reaching implications for Louisiana tort law. The importance of this issue is suggested by the proliferation of strict liability theories in Louisiana in recent years⁵ and is further emphasized by the legislature's adoption of a comparative negligence statute.⁶ Resolution of the question will in-

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1. For purposes of this article, the term *contributory negligence* refers to ordinary contributory negligence, defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection. . . . The standard of conduct to which the plaintiff must conform for his own protection is that of a reasonable man under like circumstances." *Smolinski v. Taulli*, 276 So. 2d 286, 290 (La. 1973).

2. See W. PROSSER, *THE LAW OF TORTS* § 65, at 416 (1971).

3. LA. CIV. CODE art. 2323.

4. For the remainder of this article, the term *contributing negligence* will be used in place of *contributory negligence* to describe such conduct occurring after the date of the comparative negligence statute (1979). The term *contributing negligence* is employed here in a conscious effort to dissociate such plaintiff conduct and its effect under the comparative negligence statute from the connotations attached to *contributory negligence*. In fact, the principal objective of the new terminology is to prevent the association of the old absolute bar to recovery with *contributing negligence*. Under comparative negligence, when the plaintiff's substandard conduct is causally related to his harm and when it is not incompatible with the policies for which strict liability was imposed in the first place, such plaintiff conduct should serve to *reduce* recovery. The plaintiff's negligence will not be a windfall for the defendant; recovery is no longer an all-or-nothing proposition when the plaintiff has been negligent. Neither party will be forced to bear the entire burden of a loss for which, by hypothesis, both are responsible.

The term *contributory negligence* will still be used, however, to describe a plaintiff's own substandard conduct occurring in the past (prior to comparative negligence) and to discuss the statutes which incorporate this term.

5. Some commentators have suggested that the shift to strict liability theories already threatens to supplant the negligence theory of recovery. See Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979 (1982); see also the sources cited in note 7, *infra*.

6. LA. CIV. CODE art. 2323, as amended by 1979 La. Acts, No. 431, § 1. The statute seems to have removed the prospect of contributing negligence as an absolute bar

fluence any further development of strict liability theories⁷ and may determine the scope of the comparative negligence statute's operation in strict liability actions.⁸ Despite its importance, however, the question of when contributing negligence should be a defense in strict liability actions has not yet been definitively answered by the Louisiana Supreme Court.

In light of the question's importance in Louisiana tort law, a clear answer is needed. The thesis of this article is that contributing negligence should be a defense in strict liability cases when compatible with the policies underlying the strict liability theories.⁹ The

to plaintiffs' recovery in strict liability situations, if contributing negligence is allowed as a defense in such actions. As noted in *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 544 n.11 (5th Cir. 1980),

The increasingly widespread abrogation of the total bar of contributory negligence in favor of the mitigation of comparative negligence has resulted in some rethinking of the traditional rule that contributory negligence does not affect the strict liability plaintiff's recovery. A trend toward allowing such conduct to reduce recovery is developing.

7. Several types of strict liability have been developed in recent years. See *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971) (defective products); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971) (ultrahazardous activities); LA. CIV. CODE art. 2321 and *Holland v. Buckley*, 305 So. 2d 113 (La. 1974) (animals); LA. CIV. CODE art. 2318 and *Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (children under the age of discretion); LA. CIV. CODE art. 2317 and *Loescher v. Parr*, 324 So. 2d 441 (La. 1975) (defective things in one's custody); LA. CIV. CODE art. 2322 and *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1979) (liability to persons on the premises).

8. The availability of contributing negligence as a defense may control application of the comparative negligence statute. The statute reads:

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

LA. CIV. CODE art. 2323 (emphasis added). See also Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403, 404 (1980); Note, *A Functional Purpose for Comparing Faults: A Suggestion for Reexamining "Strict Liability,"* 41 LA. L. REV. 1374, 1382 (1981); cf. Chamallas, *Comparative Fault and Multiple Party Litigation: A Sampling of the Problems*, 40 LA. L. REV. 373, 375 n.5 (1980).

9. This discussion assumes that the comparative negligence statute will apply where contributing negligence is allowed as a defense, whether the action is in negligence or strict liability. The language of the statute is certainly susceptible of this interpretation. The applicable portion of article 2323 begins with the phrase, "When contributory negligence is applicable," and speaks of comparing defendant's fault to plaintiff's negligence. For purposes of Louisiana law, the term *fault* is broader than negligence. *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1072-77, 1083-86, 249 So. 2d 133, 136-37, 139-41 (1971). Fault may include legally imposed strict liability as well as negligence. See *Turner v. Bucher*, 308 So. 2d 270, 277 (La. 1975); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974). Thus, the statute should be able to operate in the strict liability area. However, it can so operate only if contributing negligence is a defense.

policies underlying the different strict liability theories will be examined in order to ascertain where compatibility exists, and some of the options available to the courts in formulating rules from an analysis of these policies will be explored.

Current Status of Contributing Negligence as a Defense in Louisiana Strict Liability Actions.

At one time it seemed well settled that contributory negligence was not available as a defense in strict liability actions in Louisiana.¹⁰ There were some intimations by intermediate appellate courts that the "victim fault" defense to some forms of strict liability might include contributory negligence, but these were considered contrary to the weight of authority and given little attention.¹¹ The status of contributing negligence as a defense in strict liability actions was called squarely into question, however, by *Dorry v. Lafleur*,¹² in which a plurality of the Louisiana Supreme Court observed that "[w]here a plaintiff's negligence contributes to his own damage, there is no reason to ignore his fault in every case simply because the defendant's liability is based on some legal fault other than negligence."¹³ The plurality, in dicta,¹⁴ went on to state that contributing negligence could be a

This is because the statute provides only for comparison of the plaintiff's negligence with defendant's fault. See notes 33-44, *infra*, and accompanying text.

For another approach to the problem of deciding when contributing negligence should be a defense in strict liability actions, see Note, *Victim Fault: Who Are You Really and What Were You Before?*, 42 LA. L. REV. 1393, 1405 & 1407 (1982). The author of that article suggests that the availability of contributing negligence in strict liability actions should be determined by classification of the activities involved as either "innocuous" or "ultrahazardous."

10. See, e.g., *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980); *Khoder v. A.M.F., Inc.*, 539 F.2d 1078 (5th Cir. 1976); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971); F. STONE, TORT DOCTRINE § 439 in 12 LOUISIANA CIVIL LAW TREATISE 566 (1977).

11. See cases cited in notes 26 & 27, *infra*.

12. 399 So. 2d 559 (La. 1981).

13. *Id.* at 560.

14. The plurality opinion in *Dorry* was written by a justice ad hoc and joined by only two justices. Three justices concurred in the result only, and one justice dissented. Furthermore, the plurality's statement that contributory negligence could be a defense in a strict liability action was, at best, dicta. The plurality concluded that contributory negligence was not a defense under the circumstances presented in *Dorry*. In *Morgan v. Hartford Accident & Indem. Co.*, 402 So. 2d 640 (La. 1981), the only case since *Dorry* in which the Louisiana Supreme Court has confronted the issue, the court found that the plaintiff was not contributorily negligent under the facts presented. Consequently, the court found it unnecessary to decide whether contributory negligence could have been a defense.

In *Creamer v. Empire Fire & Marine Ins. Co.*, 405 So. 2d 651 (La. App. 3d Cir. 1981), a case involving facts almost identical to those in *Dorry*, the plaintiff cited *Dorry* as authority for the proposition that contributory negligence was *not* a defense to

defense in some strict liability actions, but its availability as a defense should be determined on a case-by-case basis.¹⁵ The real significance of *Dorry*, however, lies in the plurality's recognition of the issue and the need to address it. *Dorry* is the first case in which members of the Louisiana Supreme Court stated that contributing negligence *could* be a defense in a strict liability action and broached the question of when it *should* be a defense.¹⁶

Some appellate decisions, although limited in scope, have sought to implement the *Dorry* plurality's position.¹⁷ While these decisions are important, there has been little overall progress since *Dorry* on the question of when contributing negligence should be a defense in strict liability actions. Thus, both the prior jurisprudence and the post-*Dorry* developments must be examined to determine the current status of contributing negligence as a defense in strict liability actions. To facilitate this inquiry, distinctions will be drawn among three "species" of strict liability: strict liability for ultrahazardous activities, strict products liability, and strict liability imposed under the "responsibility" articles of the Civil Code.¹⁸

his own strict liability claim. The third circuit distinguished *Dorry*, holding that strict liability did not apply in the situation presented. However, Judge Culpepper stated in his concurrence: "As I understand *Dorry*, a majority of the Supreme Court does not hold contributory negligence is *not* a defense to strict liability." *Id.* at 655 (emphasis added).

Indeed, as aptly noted by Judge Culpepper, there was no holding in *Dorry* as to either proposition—i.e., that contributory negligence could or could not be a defense in strict liability actions. *Dorry* has been cited in only one of the Louisiana strict liability cases decided in the Fifth Circuit since it was handed down, and even then it was cited only in passing. The court noted only that whether contributory negligence could be a defense to a strict liability claim was an unsettled question of Louisiana law; the court did not reach that question, however, disposing of the case on other grounds. *Branch v. Chevron Int'l Oil Co.*, 681 F.2d 426, 431 n.6 (5th Cir. 1982).

15. 399 So. 2d at 561. The plurality in *Dorry* discussed the defense of contributory negligence as a bar to plaintiff's action. This is because the facts of *Dorry* occurred before the effective date of the comparative negligence statute. 1979 La. Acts, No. 431 (effective Aug. 1, 1980). Thus, the court had to apply the precomparative negligence law of contributory negligence. See Note, *supra* note 9, at 1408.

16. 399 So. 2d at 561.

17. See cases cited in notes 29 & 30, *infra*.

18. The courts also have distinguished between these species of strict liability. See, e.g., *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 497-99 (La. 1982); *Dorry v. Lafleur*, 399 So. 2d at 560-61; *Carpenter v. State Farm Fire & Cas. Co.*, 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982).

Strict liability under the "responsibility" articles refers only to the strict liability Louisiana imposes under Civil Code articles 2317, 2318, 2321, and 2322 and is intended to represent a category of strict liability distinct from the categories for products and for ultrahazardous activities. See cases cited in note 7, *supra*.

It is possible that *Kent v. Gulf States Utils. Co.* has altered the Louisiana law of strict liability. *Kent* may be no more than a summary of Louisiana law on strict liability.

In the species of strict liability Louisiana imposes for ultrahazardous (abnormally dangerous) activities, contributory negligence has traditionally been unavailable as a defense.¹⁹ In fact, the courts have distinguished the liability imposed for ultrahazardous activities from other strict liability theories, characterizing it as *absolute* in nature.²⁰ It may be that the *Dorry* opinion has produced no change in regard to the availability of contributing negligence as a defense in this type of strict liability action. As the plurality in *Dorry* noted in commenting on *Langlois v. Allied Chemical Corp.*,²¹ "The rejection of contributory negligence as a defense to Langlois' claim based on Allied's ultrahazardous activity was undoubtedly correct."²²

Furthermore, contributing negligence is not currently recognized by the courts as a defense in strict products liability actions.²³ The great weight of authority suggests that in the products area, only plaintiff's conduct which constitutes an independent and superseding cause or which rises to the level of assumption of risk will be a defense to the strict liability action. In fact, most courts (and especially the federal courts) seem to think that Louisiana will stay in line with section 402A of the *Restatement (Second) of Torts* as to strict products liability; that section permits only assumption of risk as a defense.²⁴

ty; however, at least one commentator has suggested that *Kent* does away with the strict liability imposed under the responsibility articles of the Civil Code altogether, replacing that form of strict liability with a negligence standard. See Crawford, *Developments in the Law, 1981-1982—Torts*, 43 LA. L. REV. 607 (1982). If this type of strict liability has been replaced by negligence, the arguments made here in regard to that group of cases should apply *a fortiori*. There is no doubt that the comparative negligence statute embraces negligence cases.

19. See *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971) (escaping gas used in manufacture of petrochemical products); *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (1968); *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957) (crop dusting by airplanes); *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 80 So. 2d 845 (1955) (blasting with explosives); *D'Albora v. Tulane Univ.*, 274 So. 2d 825 (La. App. 4th Cir.), *cert. denied*, 278 So. 2d 504, 505 (La. 1973) (pile driving).

20. See *Kent v. Gulf States Utils. Co.*, 418 So. 2d at 497-99; see also cases cited in notes 18 & 19, *supra*.

21. 258 La. 1067, 249 So. 2d 133 (1971).

22. 399 So. 2d at 560. See also, Note, *supra* note 9, at 1407.

23. See *Alford v. Pool Offshore Co.*, 661 F.2d 43 (5th Cir. 1981); *Khoder v. A.M.F., Inc.*, 539 F.2d 1078 (5th Cir. 1976); *Hyde v. Chevron U.S.A., Inc.*, 514 F. Supp. 740 (E.D. La. 1981); *Poland v. Beard-Poulan*, 483 F. Supp. 1256 (W.D. La. 1980); *Hastings v. Dis Tran Prods., Inc.*, 389 F. Supp. 1352 (W.D. La. 1975); *Tri-State v. Fidelity & Cas. Ins.*, 364 So. 2d 657, 661 (La. App. 2d Cir. 1978); *Dixon v. Gutnecht*, 339 So. 2d 1285 (La. App. 1st Cir. 1976); *Robertson, Manufacturers' Liability for Defective Products in Louisiana Law*, 50 TUL. L. REV. 50, 67 (1975).

24. See *Khoder v. A.M.F., Inc.*, 539 F.2d 1078, 1081 (5th Cir. 1976); *Hastings v. Dis Tran Prods., Inc.*, 389 F. Supp. 1352, 1358 (1975); *Tri-State v. Fidelity & Cas. Ins.*, 364 So. 2d 657, 661 (La. App. 2d Cir. 1978); *Dixon v. Gutnecht*, 339 So. 2d 1285, 1289-90

However, there have not been any post-*Dorrry* developments on the status of contributing negligence as a defense in the products area.

The post-*Dorrry* developments have involved the strict liability imposed under the responsibility articles of the Louisiana Civil Code,²⁵ and indications are that contributing negligence is being allowed as a defense. Even before *Dorrry*, contributory negligence was allowed as a defense by some appellate courts in this area.²⁶ These decisions, while refusing to hold that contributory negligence *as such* was a defense to the strict liability claim, generally held that the plaintiff's conduct (which really was contributory negligence) amounted to "victim fault" that would exculpate the defendant.²⁷ Perhaps these courts were simply trying to limit strict liability under article 2317 and the only means available was to interpret the plaintiff's conduct as "victim fault."²⁸ In any event, there have been several post-*Dorrry* appellate

(La. App. 1st Cir. 1976); Robertson, *supra* note 23, at 67. The pertinent part of the RESTATEMENT reads as follows:

Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A, comment (n) (1965).

25. See note 18, *supra*.

26. LA. CIV. CODE art. 2317. See *Sepulvado v. State, Through Dep't of Highways*, 395 So. 2d 858 (La. App. 2d Cir. 1981); *Godwin v. Government Employees Ins. Co.*, 394 So. 2d 751 (La. App. 3d Cir. 1981); *Sullivan v. Gulf States Utils. Co.*, 382 So. 2d 184 (La. App. 1st Cir. 1980); *Hebert v. United Serv. Auto. Ass'n*, 355 So. 2d 575 (La. App. 3d Cir.), *writ denied*, 356 So. 2d 1002 (La. 1978); *Korver v. City of Baton Rouge*, 348 So. 2d 708 (La. App. 1st Cir. 1977); *Richards v. Marlow*, 347 So. 2d 281 (La. App. 2d Cir. 1977); *Parker v. Hanks*, 345 So. 2d 194 (La. App. 3d Cir.), *writ denied*, 346 So. 2d 224 (La. 1977). *But see* *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971); *F. Stone*, *supra* note 10.

27. The "victim fault" defense has often been recognized by the Louisiana Supreme Court in strict liability actions predicated on the responsibility articles. *See, e.g.,* *Loescher v. Parr*, 324 So. 2d 441 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270 (La. 1975); *Holland v. Buckley*, 305 So. 2d 113 (La. 1974). Nevertheless, what is encompassed by "victim fault" has yet to be fully delineated by the Louisiana Supreme Court. The majority of courts and commentators (before *Dorrry*) seemed to think that contributing negligence did not amount to "victim fault" that would exonerate the defendant in a strict liability action. *See, e.g.,* *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980); Note, *supra* note 8, at 1378-81.

28. In fact, in *American Road Ins. Co. v. Montgomery*, 354 So. 2d 656 (La. App. 1st Cir.), *writ denied*, 356 So. 2d 430, 434, 435 (La. 1977), the first circuit went beyond even the position that contributing negligence could be equated with victim fault for

decisions in this area holding that contributing negligence is a defense²⁹ or amounts to victim fault.³⁰ The rationale for these holdings has been simply this: Where the policy considerations traditionally associated with strict liability—those related to ultrahazardous activities or products—are not present, the defense of contributing negligence should not be denied the defendant. The only statement to date by the Louisiana Supreme Court on the compatibility of contributing negligence with this species of strict liability was made in *Dorry*, in which a plurality of the court declared, "There is no policy reason to deny to these strictly liable defendants the defense of contributory negligence."³¹ Arguably, despite the lack of a clear holding from the Louisiana Supreme Court on the issue, contributing negligence does seem to be a defense to this kind of strict liability action.

When Contributing Negligence Should Be A Defense

The most important question in this area is whether contributing negligence *should* be a defense to a strict liability action. The paramount considerations in answering this question are the policies underlying the various strict liability theories and the extent to which the defense of contributing negligence is consonant with those policies in the context of a reduced recovery system. There are, however, some preliminary considerations which must be discussed.

Initially, it must be emphasized that the plaintiff's negligence should be a defense in strict liability actions *only* if comparative principles can be applied. If the comparative negligence statute can not be applied, the plaintiff's negligence, if allowed as a defense, will function as an absolute bar to his recovery; consequently, some of the very policies which fostered the strict liability theories will be defeated. For instance, allowing the plaintiff's fault to operate as a complete bar would place the *entire* loss on the party least able to bear and distribute it; it might also reduce the financial exposure of defendants to the point that it becomes more economical to maintain

purposes of article 2317 liability. In that case the court of appeal said that a plaintiff would be prevented from recovering if his conduct was a cause-in-fact of the harm-producing incident—i.e., conduct that was a cause-in-fact of the harm constituted victim fault for purposes of article 2317 liability. See also *Godwin v. Government Employees Ins. Co.*, 394 So. 2d 751 (La. App. 3d Cir. 1981).

29. *Carpenter v. State Farm Fire & Cas. Co.*, 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982); *Stewart v. Sam Wallace Indus. Co.*, 409 So. 2d 335, 339 (La. App. 1st Cir.), writ denied, 413 So. 2d 497 (La. 1981).

30. *LeBlanc v. State, La. Dep't of Highways*, 405 So. 2d 635 (La. App. 3d Cir. 1981); *Edwards v. State, Dep't of Transp. & Dev.*, 403 So. 2d 109 (La. App. 3d Cir. 1981); *Jackson v. Tri-State Elevator Co.*, 401 So. 2d 538, 543 n.6 (La. App. 3d Cir. 1981). See also *Falgout v. Wardlaw*, No. 15,020 (La. App. 2d Cir. Oct. 25, 1982).

31. 399 So. 2d at 561.

product defects and substandard practices than to correct them.³² Thus, the policies underlying strict liability, such as enterprise liability or loss distribution, would be frustrated.

The Louisiana comparative negligence statute³³ should apply where a plaintiff's negligence is allowed as a defense in strict liability actions;³⁴ all the Louisiana courts need decide is whether a plaintiff's contributing negligence should be allowed as a defense in the type of strict liability action involved. The history of the comparative negligence statute lends support to this conclusion. The language finally passed by the Louisiana Legislature in 1979 was, with very few changes, that drafted by a special committee of the Louisiana State Law Institute in 1970 at the request of the legislature.³⁵ At that time, strict liability in this state was being imposed only under the servitude articles of the Civil Code;³⁶ none of the present "species" of strict liability had been developed.³⁷ Almost all Louisiana tort actions were based on negligence theories, and contributory negligence was the primary defense. However, strict liability was being imposed in some circumstances, and, arguably, the committee of the law institute intended that the language of the draft also apply to strict liability actions.³⁸ Thus, to give the comparative negligence act the same scope of application contemplated by its drafters (and presumably by the legislature),³⁹ it should be applied to the strict liability theories developed between 1970 and 1979.⁴⁰

32. See Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 802 (1977).

33. LA. CIV. CODE art. 2323.

34. See the discussion in note 9, *supra*.

35. The Louisiana State Law Institute disclaimed any position on the issue of comparative negligence when the drafted bill was submitted, however. In essence, it said to the legislature, "You told us what to do and we did it, but we express no opinion as to whether the doctrine of comparative negligence should be adopted." In his submission letter, the Institute's director said, "The institute believes that *if the legislature should decide to adopt the doctrine*, the accompanying proposal will accomplish this purpose in a desirable way." Quoted in Johnson, *Comparative Negligence in Louisiana: What Hath We Wrought?*, 14 TRIAL BRIEF 48, 54 n.3 (1981) (emphasis added).

36. LA. CIV. CODE arts. 667-669.

37. See note 7, *supra*.

38. It seems that the language originally drafted by the Louisiana State Law Institute was intended to encompass all claims for personal injury or property damage, under both negligence and strict liability theories. The term *fault* probably was used to describe the defendant's conduct in an attempt to include within the terms of the draft the strict liability then being imposed under the servitude articles.

39. The discussions of the statute in the legislature were unrecorded, and it is virtually impossible to ascertain what was said.

40. See Johnson, *supra* note 35, at 48-50. The language of the statute was drafted in 1970, and the comparative negligence statute was enacted in 1979. LA. CIV. CODE art. 2323, as amended by 1979 La. Acts, No. 431, § 1.

Furthermore, the very method of operation suggested by the language and structure of the comparative negligence act also supports this conclusion.⁴¹ The statute seems to vest courts with the discretion to decide *when* the plaintiff's negligence shall be considered in a claim for damages (whether in negligence or in strict liability). If the court, in its discretion, decides that contributing negligence should be a defense to a strict liability action, a comparison of defendant's fault and plaintiff's negligence is appropriate.⁴² Therefore, the language of the statute indicates that comparative principles will apply when the plaintiff's contributing negligence is allowed as a defense.

Finally, the intent of the legislature in passing the comparative negligence statute supports the conclusion that the statute should apply where contributing negligence is allowed as a defense. It has been suggested that the legislature's intent was simply to permit a plaintiff's contributing fault to be treated as a percentage reduction in his recovery, unless strong policies suggest this should not be done.⁴³ If this was the legislature's intent, then the position adopted here is entirely consistent with it—a plaintiff's contributing negligence should reduce his recovery in strict liability actions only where compatible with the policies underlying the strict liability theory.

In addition, application of the comparative negligence statute should not be limited by restricting its operation to those situations in which contributory negligence would have been a defense under the case law at the time of the enactment. Such an interpretation would prevent the expansion of comparative principles as a complement to new emphases in tort law. For example, the shift from negligence to strict liability theories by the Louisiana Supreme Court might be retarded if the comparative negligence statute cannot be invoked by a holding that contributing negligence is an applicable defense. Furthermore, the very policies sought to be furthered by the statute will be frustrated if application of the comparative negligence statute is limited to only those situations in which contributory negligence was a defense at the time the statute was passed. Under such an interpretation, contributory negligence might continue to operate as a total bar to plaintiff's recovery in some cases, rather than as a percentage reduction of it. Therefore, courts should retain the authority to decide when contributing negligence should or should not be a defense. Indeed, this is part of a court's function under the duty-risk analysis in both negligence and strict liability actions.⁴⁴ Con-

41. See notes 8 and 9, *supra*.

42. See LA. CIV. CODE art. 2323, quoted in note 8, *supra*; Johnson, *supra* note 35, at 52-54; Plant, *supra* note 8, at 415.

43. Johnson, *supra* note 35, at 49-50.

44. The court always has the power to define the defendant's duty. Whether the action is in negligence or strict liability depends on the court's choice of standard.

tributory negligence is a judicially fashioned doctrine that has always been judicially controlled. The legislature's intent in the comparative negligence statute was not to remove control of the doctrine from the judiciary, but merely to ameliorate its effects when applied.

Another problem common to the application of contributing negligence as a defense in each of the three species of strict liability (ultrahazardous activities, products liability, and the responsibility articles) is the conceptual difficulty encountered in comparing negligence and strict liability. Some courts have insisted that because negligence and strict liability (which involves holding a defendant liable despite his exercise of the utmost care) are theoretically distinct concepts, the two, like apples and oranges, cannot be compared.⁴⁵ These courts have refused to allow contributing negligence to reduce recovery in strict liability actions by refusing to apply comparative principles in strict liability cases. Such refusals have not been based on *policy* grounds, however, and while such conceptual or semantic problems with negligence and strict liability must be acknowledged, they should not control the result. As noted by the California Supreme Court:

The inherent difficulty in the "apples and oranges" argument is its insistence on fixed and precise definitional treatment of legal concepts. In the evolving areas of both products liability and tort defenses, however, there has developed much conceptual overlapping and interweaving in order to attain substantial justice. . . . *Fixed semantic consistency at this point is less important than the attainment of a just and equitable result.*⁴⁶

Most jurisdictions confronted with the issue have applied comparative principles in strict liability cases and have allowed contributing negligence to reduce a plaintiff's recovery, despite the theoretical and conceptual difficulties.⁴⁷ Moreover, comparison of plaintiff's negligence

based upon its definition of the defendant's duty. See *Rue v. Dep't of Highways*, 372 So. 2d 1197 (La. 1979); *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978); *Baumgartner v. State Farm Mut. Auto. Ins. Co.*, 356 So. 2d 400 (La. 1978); *Johnson, Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319, 338-39, 341 (1980).

45. *Brown v. Link Belt Corp.*, 565 F.2d 1107, 1112-13 (9th Cir. 1977) (applying prior Oregon law); *Kinard v. Coats Co., Inc.*, 37 Colo. App. 555, 557-58, 553 P.2d 835, 837-38 (1976); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 at 1365, 1367 (Okla. 1974); *Plant*, *supra* note 8, at 404, 417; 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A(5)(g) (1982).

46. *Daly v. General Motors*, 20 Cal. 3d 725, 734, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385 (1978) (emphasis added).

47. See, e.g., *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *General Motors Corp. v. Hopkins*, 548 S.W.2d

with defendant's fault in strict liability actions has presented no insurmountable difficulties in these jurisdictions.⁴⁸

If the comparative negligence statute *can* operate in strict liability actions, it is then appropriate to consider whether contributing negligence *should* be a defense in strict liability actions. The conclusions reached should depend on the compatibility of the defense with the policies underlying the strict liability theory and may vary with the species of strict liability. Each species of strict liability will be examined in an attempt to draw some conclusions as to when contributing negligence should be a defense in a strict liability action.

Ultrahazardous Activities

The primary policy underlying strict liability for ultrahazardous activities can be summarized as follows: "There are some activities in which the risk may be altogether reasonable and still high enough that the party ought not undertake the activity without assuming the consequences."⁴⁹ Some activities are simply very dangerous, even

344 (Tex. 1977); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1975); R.I. GEN. LAWS § 9-20-4 (Supp. 1981).

48. Some jurisdictions have resorted to a "comparative causation" approach to obviate the conceptual difficulties of comparing negligent conduct with nonnegligent conduct (*i.e.*, conduct for which strict liability is imposed). Under this approach, the finder of fact simply determines the extent to which the plaintiff's negligence and the defendant's nonnegligent conduct *caused* the harm. The plaintiff's recovery is then reduced by the degree to which his negligence contributed to his harm. *See* *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977). Other jurisdictions have experienced no real difficulty in comparing plaintiff's negligence to defendant's nonnegligent conduct, even without resort to "comparative causation." *See, e.g.*, *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Daly v. General Motors*, 20 Cal. 3d 725, 575 P.2d 1162 144 Cal. Rptr. 380 (1978); N.Y. CIV. PRAC. LAW § 1141 (McKinney 1975); R.I. GEN. LAWS § 9-20-4 (Supp. 1981).

Mississippi may have adopted the best approach to resolution of these difficulties. Its comparative negligence statute simply leaves the question of comparing plaintiff's negligence to defendant's conduct (whether nonnegligent or not) to the jury. Under the Mississippi statute, the jury would simply be told that it could reduce the plaintiff's recovery in proportion to his negligence, and it then would be left to its deliberations. The Mississippi statute reads:

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but *damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.*

MISS. CODE ANN. § 11-7-15 (1972) (emphasis added).

49. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498 (La. 1982).

though conducted with every possible precaution. If the activity is unusual or abnormal in the community, strict liability is imposed because social policy dictates that those who seek to benefit by engaging in ultrahazardous or abnormally dangerous activities, or who create such conditions, must pay for the losses occasioned by them.⁵⁰ The problem has been treated by the courts as one of allocating inevitable losses, and the courts have stressed that the defendant enterprise is in a better position to absorb and distribute such losses than the innocent victim. The enterprise can simply pass the risk or losses on to the public as a cost of doing business.

In reality, however, all such losses are not inevitable, especially where the plaintiff has negligently contributed to his harm, and it seems unreasonable to require the defendant (and, ultimately, the public) to bear the burden of that portion of the loss occasioned by the plaintiff's negligence. Thus, in a reduced recovery system, allowing the defense of contributing negligence in strict liability actions based on ultrahazardous activities may not be incompatible with the policies that require the imposition of strict liability. Furthermore, there does not appear to be any basic public policy in this area of strict liability in opposition to the policy underlying comparative negligence or requiring the defendant engaging in ultrahazardous activities to shoulder the whole loss regardless of the plaintiff's negligence.⁵¹

If contributing negligence were allowed to reduce recovery in strict liability actions for ultrahazardous activities, the allocation of the loss between the parties would be based on the *fault* of each. Under such a system, the enterprise engaging in the ultrahazardous activity would remain strictly liable for the portion of the loss attributable to its fault (*i.e.*, its conduct in engaging in the activity), despite its exercise of the utmost care. However, the enterprise would not be liable for that portion of the loss caused by the plaintiff's fault. The totally innocent plaintiff's recovery would not be reduced; at the same time, the public would not bear that portion of the loss caused by the negligent plaintiff. Thus, society's interest in the socially valuable but dangerous activity would also be taken into account.

Further support for the proposition that the defense of contributing negligence is not incompatible with the policies underlying strict liability for ultrahazardous activities may be found in the terms

50. *Id.* at 498-99. See also *Carpenter v. State Farm Fire & Cas. Co.*, 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982); W. PROSSER, *supra* note 2, § 78 at 494-95; Malone, *Neighboring Landowners—Dangerous Activities*, 31 LA. L. REV. 231, 244-47 (1971).

51. See Plant, *supra* note 8, at 417.

of the Uniform Comparative Fault Act.⁵² The Act provides for comparison of any "fault" on the part of the plaintiff with the "fault" of the defendant; "fault" is defined to include "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability."⁵³ Further, the comment to section 1 of the Act states that "strict liability for . . . abnormally dangerous activities . . . bears a strong similarity to negligence as a matter of law . . . , and the factfinder should have no real difficulty in setting percentages of fault."⁵⁴

The present position of the Louisiana courts is that the defense of contributing negligence is incompatible with the policies underlying strict liability for ultrahazardous activities.⁵⁵ Even the plurality in *Dorry* seemed to suggest that contributing negligence should not be a defense in strict liability actions for ultrahazardous activities.⁵⁶ Louisiana courts have characterized liability for ultrahazardous activities as "an *absolute* liability . . . , which virtually makes the enterpriser an insurer."⁵⁷ At the same time, however, the Louisiana Supreme Court has said in regard to ultrahazardous activities:

It is noteworthy that, in each of the activities placed in this special category by decisions of Louisiana courts, *the enterpriser is almost invariably the sole cause of the damage* and the victim seldom has the ability to protect himself. *No decisions have placed in this category any activities in which the victim or a third person can reasonably be expected to be a contributory factor in the causation of damages with any degree of frequency.*⁵⁸

This language does not indicate that the Louisiana courts feel that contributing negligence and this type of strict liability are incompatible. Rather, the language indicates a feeling that the possibility of a plaintiff's negligence contributing to his harm where activities classified as ultrahazardous are involved is so slight as to justify a *per se* rule of absolute liability. If the characterization of these activities as ones in which the enterpriser is usually the sole cause

52. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 33 (1979) (found in 1982 Supp.), quoted in *Appendix*, 40 LA. L. REV. 419 (1980).

53. UNIF. COMPARATIVE FAULT ACT, § 1(b) (emphasis added).

54. *Id.* § 1, comment.

55. See *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498-99 (La. 1982); *Dorry v. Lafleur*, 399 So. 2d 559, 560 (La. 1981); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1086, 249 So. 2d 133, 140 (1971); *Carpenter v. State Farm Fire & Cas. Co.*, 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982); *Stewart v. Sam Wallace Indus. Co.*, 409 So. 2d 335, 339 (La. App. 1st Cir. 1981).

56. See notes 21 & 22, *supra*, and accompanying text.

57. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498 (La. 1982). See cases cited in notes 18 & 19, *supra*.

58. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 499 n.8 (La. 1982) (emphasis added).

of the loss is correct, then the result obtained—full recovery by the plaintiff—will generally be the same if contributing negligence is allowed as a defense. This is because the test for contributing negligence is the same as that for primary negligence—the plaintiff's substandard conduct must have been a *cause* of his loss before he can be considered contributorily negligent. In those cases where the enterprise is not the sole cause of the damage, however, a more equitable allocation of the loss will be achieved by permitting the plaintiff's negligence to operate in reduction of his recovery. Admittedly, circumstances will rarely arise in which the plaintiff's fault will be a contributing cause of the damage.⁵⁹ Nevertheless, contributing negligence should be available as a defense in strict liability actions based on ultrahazardous activities.⁶⁰

Products Liability

The basic policies underlying strict liability in the products area are: (1) to ease the plaintiff's burden of proof, and (2) "[t]o insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁶¹ This latter policy is itself predicated upon two further considerations—the relative position of the parties⁶² and the ability of the enterprise to absorb these losses and distribute the risk.⁶³ Whether these policies are served or hindered by allowing ordinary contributing negligence as a defense has been the subject of controversy.⁶⁴ In fact, the conclusions reached in regard to the compatibility of contributing negligence and the policies of strict products

59. For example, a plaintiff who enters a remote area clearly marked for blasting and is injured by the blasting might be found contributorily negligent and suffer a reduction in recovery.

60. The question of whether contributing negligence should be a defense in strict liability actions for ultrahazardous activities is a close one. Even if contributory negligence is available as a defense in these actions, defendants seldom will be able to make out the defense, and where they can, it will usually result in only a slight reduction in the plaintiff's recovery. Thus, one might conclude that the game is not worth the candle and that contributory negligence should not be allowed as a defense to this species of strict liability for reasons of administrative inconvenience. See cases cited in note 55, *supra*, and accompanying text; see also Note, *supra* note 9, at 1405-07.

61. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

62. The manufacturer is the only party with the ability to address the problems of product defects in an effective manner; holding the manufacturer liable for the defects in his products will provide an incentive for the manufacture of safer products.

63. The manufacturer can distribute these risks or losses either as a cost of doing business or through liability insurance.

64. Cf. Plant, *supra* note 8, at 415.

liability may well depend upon which of the policies is given greatest emphasis.⁶⁵ For instance, if the policy of placing the loss upon the party best able to bear it (a facet of enterprise liability) is taken as the primary policy underlying strict products liability, that policy would be defeated to the extent that the plaintiff's contributing negligence reduced his recovery—only part of the loss would fall on the party able to distribute it through society, and the other part would fall on the consumer or bystander alone.⁶⁶ The protection afforded consumers by the loss distribution policy would be eroded.⁶⁷ Thus, if this policy were viewed as the primary one underlying strict products liability, contributing negligence is incompatible with it and should not be allowed as a defense in strict products actions.

However, products liability was not developed solely as a loss distribution mechanism. It was also predicated on a desire to hold manufacturers liable for costs of injuries caused by defective products because it was thought that exposure to liability would induce manufacturers to produce products free from defects.⁶⁸ This policy is not necessarily incompatible with the defense of contributing negligence. The manufacturer remains exposed to strict liability; the only difference is that the amount of damages are reduced in proportion to the plaintiff's negligence.⁶⁹ Furthermore, it seems unreasonable to expect other consumers of a product to pay for the entire loss when it was caused in part by plaintiff's negligence.⁷⁰ The California Supreme Court, the progenitor of strict products liability, has consistently stated that the primary purpose of strict liability is simply to ease plain-

65. *Id.* at 415-17.

66. See Hickey, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501, 521 (1978).

67. See L. FRUMER & M. FRIEDMAN, *supra* note 45, § 16A(5)(g)(iv), at 3B-230.5.

68. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 896, 27 Cal. Rptr. 697 (1962).

69. See, e.g., *Daly v. General Motors*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). But see Twerski, *supra* note 32, at 802, where it is suggested that by allowing contributory negligence to function as a percentage reduction in plaintiff's recovery, "we may be reducing the defendant's financial exposure to the point where maintaining the design defect becomes economically prudent."

70. Pinto, *Comparative Responsibility—An Idea Whose Time Has Come*, 45 INS. COUNS. J. 115, 119 (1978); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179 (1974); Note, *Comparative Negligence in a Strict Products Liability Action*, 14 IDAHO L. REV. 723, 732 (1978).

Furthermore, as one commentator has suggested, from the standpoint of general social welfare, it seems desirable to encourage due care and prudence on the part of the consumer (by making him bear that portion of the loss occasioned by his own fault) as well as the manufacturer. Pinto, *supra*, at 119.

See also Plant, *supra* note 8, at 415, criticizing the economic underpinnings of enterprise liability.

tiff's burden of proof. Allowing contributing negligence as a defense would not affect plaintiff's burden of proof. Given these policy considerations, allowing the defense of contributing negligence in strict products liability actions seems perfectly acceptable. The language of the California Supreme Court in *Daly v. General Motors*⁷¹ delineates this compatibility very succinctly:

The foregoing goals, we think will not be frustrated Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff's recovery will be reduced *only* to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will, through him, be "spread among society." However, we do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault, we discern no reason of policy why it should . . . be borne by others.⁷²

Thus, contributing negligence should be permitted to operate as a reduction in plaintiff's recovery in *all* strict products liability actions.⁷³ This is the position best calculated to promote the more equitable allocation of loss envisioned by comparative negligence.

Even if a court is unwilling to allow *all* forms of contributing negligence as a defense in strict products liability actions, there is still room for a "middle ground" position that would allow at least some forms of contributing negligence to reduce a plaintiff's recovery.

71. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

72. 20 Cal. 3d at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87.

73. Several jurisdictions have reached this same conclusion, some by judicial decision and some by statute. *See, e.g.,* Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); *Daly v. General Motors*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MICH. COMP. LAWS § 600-2949 (Supp. 1981-82); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); OR. REV. STAT. § 18-470 (1981); R.I. GEN. LAWS § 9-20-4 (Supp. 1981). These jurisdictions found easing the plaintiff's burden of proof to be the primary policy of strict products liability or found comparative principles to be controlling or conducive to a more equitable allocation of losses. One court emphasized the anomalous situation that would exist if a negligent plaintiff's recovery were reduced in his action against the negligent manufacturer but not against the nonnegligent manufacturer. *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d at 46.

In fact, most courts that have considered the question have not allowed *all* forms of contributing negligence to operate as defenses in strict products liability actions.⁷⁴ These courts have held that contributing negligence in the form of negligent failure to inspect a product or to guard against defects is not a defense in a strict products liability action.⁷⁵ The basis for this distinction between forms of contributing negligence is grounded in a consideration of the relative positions of the parties and a feeling that the responsibility for marketing defective products should not be shifted, even in part, to consumers *unable to evaluate the dangers* in the products.⁷⁶ However, there is no reason to exclude as defenses in strict products liability actions forms of contributing negligence other than negligent failure to inspect for or to guard against a defect in a product. In fact, these "other" forms of contributing negligence already may be not only defenses in strict products liability actions but also absolute bars to recovery when shown. As one commentator has suggested, *misuse of the product* may be no more than another name for these "other" types of contributing negligence.⁷⁷ Given this, permitting such "other" forms of contributing negligence to merely reduce a plaintiff's recovery seems an easy step. In fact, it may be desirable to eliminate *misuse* as a complete defense and to replace the total bar to recovery that it presents with the reduction in recovery associated with the "other" forms of contributing negligence.

The Responsibility Articles

The shift to the imposition of strict liability under the respon-

74. See, e.g., *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972), where the court said:

Contributory negligence may be a defense to a strict liability action as well as to a negligence action. . . . However, in negligence cases the defense has been held to be unavailable where considerations of policy and justice dictate. . . . [U]ndoubtedly the defense will be unavailable in special situations within the strict liability field.

60 N.J. at 412, 290 A.2d at 286.

75. See, e.g., *West v. Caterpillar Tractor Company, Inc.*, 336 So. 2d 80; 2 L. FRUMER & M. FRIEDMAN, *supra* note 45, § 16A(5)(g)(v), at 3B-230.7; RESTATEMENT (SECOND) OF TORTS § 402A, comment (n) (1975).

76. See 2 L. FRUMER & M. FRIEDMAN, *supra* note 45, § 16A(5)(g)(v), at 3B-230.7.

77. Crawford, *Work of the Louisiana Appellate Courts for the 1971-1972 Term—Torts*, 33 LA. L. REV. 206, 208 (1973). See also *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981); *Butaud v. Suburban Marine & Sporting Goods*, 555 P.2d 42, 46. In the former case, the Utah Supreme Court held that a finding of misuse by the injured user of a product did not completely bar his recovery in a claim based on strict liability in tort. The court said: "Specifically, we adopt this rule: The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect." *Id.* at 1303-04.

sibility articles of the Civil Code reflects a feeling by the courts that strict liability is better suited than negligence to meet the needs of a modern industrialized society.⁷⁸ This type of strict liability reflects a policy that as between innocent plaintiff and innocent defendant, the loss should be borne by the one who has maintained the risk-creating animal or thing for his own pleasure or gain.⁷⁹

The defense of contributing negligence is perfectly compatible with this policy. Where a plaintiff's negligence has contributed to his harm, the plaintiff cannot be said to be innocent and his negligence should reduce his recovery. It would be anomalous to allow the plaintiff's negligence to reduce his recovery against a negligent defendant, but not to reduce his recovery against a nonnegligent defendant under a strict liability theory.⁸⁰ The anomaly is particularly conspicuous where the defendant, although "controlling" the thing causing damage, is not engaged in some activity for economic gain.⁸¹ In these situations, the anomaly has not even the loss distribution policy of enterprise liability to justify it.⁸²

78. See *Holland v. Buckley*, 305 So. 2d 113, 120 (La. 1974); *Simon v. Ford Motor Co.*, 282 So. 2d 126, 130 (La. 1973) (Tate, J., dissenting); Malone, *supra* note 5, at 980, 984-86; Tate, *The Interpretation of Written Rule of Law*, 27 LA. B.J. 79, 82 (1979). The argument that strict liability may be better suited to the needs of a modern, industrialized society than negligence theory has provoked sharp disagreement, however. See Malone, *supra* note 5. In fact, the species of strict liability imposed under the responsibility articles may not be that far from negligence principles (witness the continuing requirement that the person or thing in the defendant's custody present an "unreasonable risk of injury"). See Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 LA. L. REV. 207, 210 (1979). Even those who prefer the negligence theory to the type of strict liability imposed under the responsibility articles recognize that the resulting liberalization of the requirements a plaintiff must meet in order to make out a prima facie case for recovery may result in greater "procedural balance for the litigating parties." Malone, *supra* note 5, at 1006. This was probably one of the Louisiana Supreme Court's objectives in shifting to this type of strict liability in the first place.

79. See *Loescher v. Parr*, 324 So. 2d 441, 446 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270, 274 (La. 1975); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974). See also LA. CIV. CODE art. 2317, which reads: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." This article had previously been interpreted to require negligence on the part of the owner or guardian, i.e., that he knew or should have known of the defect or dangerous character of the thing under his control.

80. See *Dorrey v. Lafleur*, 399 So. 2d 559, 561 (La. 1981); *Sullivan v. Gulf States Utils. Co.*, 382 So. 2d 184, 189 (La. App. 1st Cir. 1980).

81. See, e.g., *Loescher v. Parr*, 324 So. 2d 441 (La. 1975) (falling tree); *Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (bicycle riding child); *Holland v. Buckley*, 305 So. 2d 113 (La. 1974) (dogbite).

82. See cases cited in note 29, *supra*; see also text at notes 30-31.

In addition to the compatibility arguments, there may be other reasons for permitting contributing negligence to operate as a defense in this area of strict liability. The strict liability imposed under the responsibility articles is not addressed to the regulation of any specific, definable problem or relationship—it has no focus.⁸³ Strict liability under these articles may encompass a broad range of defendants and situations and could result in liability of bankrupting proportions.⁸⁴ Allowing contributing negligence as a defense in this type of strict liability action would do much to limit the liability of potential defendants and ameliorate the broad scope of this type of strict liability. Therefore, contributing negligence should be a defense in strict liability actions under the responsibility articles.

Options Available to the Courts

Louisiana courts should articulate rules governing the availability of the contributing negligence defense in strict liability actions. The courts could establish a general rule that contributing negligence is a defense in *all* strict liability actions. Such a rule would not be unique to Louisiana; both Rhode Island and New York have adopted comparative negligence statutes which allow the victim's contributing negligence to reduce recovery in all strict liability actions.⁸⁵ The Uniform Comparative Fault Act,⁸⁶ which the California Supreme Court described as evidencing "a responsible national trend,"⁸⁷ also allows contributing negligence as a defense in all strict liability actions. Further support for such a rule can be found in the urgings of some torts scholars who suggest that in order to give effect to the legislative intent expressed in Louisiana's comparative negligence statute, all plaintiff's conduct should be considered in reduction of damages in

83. See Malone, *supra* note 5, at 988.

84. *Id.* at 997.

85. R.I. GEN. LAWS § 9-20-4 (Supp. 1981) states:

In all actions hereafter brought for personal injuries . . . , the fact that the person injured . . . may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured

N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) states:

In any action to recover damages for personal injury . . . the culpable conduct attributable to the claimant . . . , including contributory negligence or assumption of the risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion to which the culpable conduct attributable to the claimant . . . bears to the culpable conduct which caused the damages.

86. UNIF. COMPARATIVE FAULT ACT § 1 (1979).

87. *Daly v. General Motors*, 20 Cal. 3d at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

all actions.⁸⁸ Furthermore, a general rule that contributing negligence is available as a defense in all strict liability actions would simplify and add certainty to the law. The appeal of such a rule is difficult to resist where, arguably, contributing negligence is not inconsistent with the policies underlying any of the three species of strict liability. Of course, the courts could still make exceptions to the general rule in special cases in the strict liability area, using the duty-risk analysis and their power to define the defendant's duty.⁸⁹ As long as these exceptions are not permitted to swallow the rule (and this is highly unlikely), a general rule that contributing negligence is a defense in all strict liability actions remains not only a plausible alternative to be considered by the courts but also an attractive one. Alternatively, Louisiana courts could carefully distinguish between each of the "types" of strict liability and articulate a rule governing the applicability of the contributing negligence defense in each of the species of strict liability, based on the compatibility of the defense with policies underlying each. Under this approach the courts still may conclude that contributing negligence should operate to reduce recovery in all strict liability actions. However, other conclusions may be reached under this approach if the underlying policies competing with contributing and comparative negligence are found more compelling in one species of strict liability than in another. This approach will afford the courts the greatest amount of flexibility in formulating rules to govern the availability of contributing negligence as a defense in strict liability actions. At the same time, it will add certainty to the law; there will be a rule for each species of strict liability, even though the rule for each species may be different. Furthermore, there is support for this approach in the jurisprudence. Louisiana courts

88. See Johnson, *supra* note 35, at 51, where Professor Johnson states:

[W]e could read the Act in keeping with its broader meaning, and treat all plaintiff conduct of a sub-standard nature (when it combines with defendant fault) as appropriate for diminution of recovery. Both sides of the debate will gain and lose from the latter interpretation. Defendants may pay diminished damages in some cases in which they might previously have escaped liability altogether on a "fault of the victim" defense. But plaintiffs may find that "ordinary carelessness" may again be a factor in diminishment of recovery in strict liability cases, though it will not be an absolute bar. On balance, we are likely to be better off with the broad reach of the diminution rule rather than the sort of all-or-nothing game we have played over the years with contributory negligence, assumption of the risk, last clear chance and fault of the victim.

(emphasis added).

89. For example, if a court concludes that the defendant's duty encompasses even protecting the plaintiff from his own negligence, contributory negligence would not be a defense and would not affect the plaintiff's recovery. See *Rue v. Dep't of Highways*, 372 So. 2d 1197 (La. 1979); *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978); *Baumgartner v. State Farm Mut. Auto. Ins. Co.*, 356 So. 2d 400 (La. 1978); Johnson, *supra* note 44, at 338-39, 341; Johnson, *supra* note 35, at 52-53.

have drawn distinctions between the various species of strict liability on several occasions and have shown an inclination to permit contributing negligence as a defense in one species of strict liability.⁹⁰ If this approach were adopted, the rules established for each species of strict liability would still be subject to such exceptions as the courts might make under the duty-risk analysis.⁹¹

Summary and Conclusions

It should be emphasized that the availability of contributing negligence as a defense in strict liability actions is a question of substantial importance to Louisiana tort law. The need for further guidance from the courts in this area is great.⁹² It is submitted that the ad hoc approach suggested in *Dorry v. Lafleur* is inadequate and will only prolong confusion. The only valid criteria for the resolution of this question are to be found in the policies underlying the various species of strict liability and their compatibility with the defense of contributing negligence. Therefore, the best approach to the question is to forthrightly distinguish the various kinds of strict liability, to recognize the different policy concerns underlying each, and to develop a rule for each kind. Courts are familiar with both the policies involved and the balancing analysis necessary to a compatibility determination. Pursuant to this method, the author's own balance of the policies leads him to the conclusion that contributing negligence should reduce the plaintiff's recovery in all strict liability actions.

John Whitney Pesnell

90. See, e.g., *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498-99 (La. 1982); *Dorry v. Lafleur*, 399 So. 2d 559, 560-61 (La. 1981); *Carpenter v. State Farm Fire & Cas.*, 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982); *Stewart v. Sam Wallace Indus. Co.*, 409 So. 2d 335, 339 (La. App. 1st Cir. 1981).

91. See notes 44 & 89, *supra*.

92. Cases arising since the effective date of the comparative negligence statute, LA. CIV. CODE art. 2323, as amended by 1979 La. Acts, No. 432 (effective Aug. 1, 1980), already are being litigated. See, e.g., *Abraham v. Hanover Ins. Co.*, 420 So. 2d 526 (La. App. 2d Cir. 1982).

